managing director, the company was held bound by the act of a person who purported to contract as its managing director though he had never been formally appointed as such.

I am therefore of the opinion that in the circumstances of this case the defendant held out Saadun as the managing director and had the ostensible authority to execute P16 and P19 and the defendant is therefore estopped from denying responsibility for Saadun's acts. By giving the subcontract to Jati Erat Sdn. Bhd. in the face of the commitment of Saadun on behalf of the defendant to the plaintiffs, the defendant clearly breached the subcontracts to the defendant whereby the only action needed to be taken is for the formal subcontracts to be executed after the formal contracts between defendant and Majlis Perbandaran Melaka Bandaraya Bersejarah and Perbadanan Kemajuan Negeri Melaka are signed.

Having ruled that there was a breach of the two subcontracts, what damages are suffered by the plaintiffs?.

The plaintiffs' claim for damages is by way of loss of profits (*Teah Kee Keong v. Tambun Mining Co. Ltd.* [1968] 1 MLJ 39). The plaintiffs adduced evidence through PW1 and PW7 where the costing was explained at length and in details as to how the loss of profit was arrived at. It may be true that PW7 is not a qualified quantity surveyor but he had given evidence of his experience in respect of such work. In any event the defendant did not seem to seriously challenge the costing was erroneous. The defendant did not even offer evidence of what could possibly be the fair costing. This they could very well do through DW2, whose company was awarded the subcontracts of the two projects. In fact DW2 gave evidence that he prepared the tenders for the two projects in which event he would be the best person to rebut the costing of the plaintiffs if the defendant felt that such costing was erroneous. In the circumstances, considering the explanation of PW1 and PW7 on their costing and the loss of profits of the plaintiffs I do not see any good grounds for me not to accept their evidence. Accordingly I gave judgment as set out earlier in my judgment.

GHEE SENG MOTOR

v.

LING SIE TING

HIGH COURT, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[CIVIL APPEAL NO. KG. 14 OF 1992 (II)
28 JULY 1993

CONTRACT: Carriage of goods by sea - Vessel with cargo on board sinks - Evidence to show the vessel was taking in water - Water was pumped out and vessel had attempted to continue on its course - Whether contract had been frustrated due to inevitable accident - Whether all reasonable care had been taken to prevent the sinking of the vessel.

TORT: Negligence - Doctrine of res ipsa loquitor - Party bearing the burden of proof.

APPEAL: Guiding principles for an appellate court in considering whether the lower court had taken full advantage of the benefit of having heard and seen the witnesses in court.

The plaintiff had entered into a contract with the defendant, a common carrier, to ship a motor car to Limbang, Sarawak. The defendant's vessel left Kuching on 30 September 1988 but enroute the captain discovered that the vessel was tilting and diverted to Sibu where the water was pumped out. At around 5.30 am on 2 October 1988 the vessel was abandoned and consequently sunk into the sea.

The plaintiff brought an action against the defendant for breach of contract and alternatively for negligence in the carriage, care and charge of the motor car by reason whereof the said car had sunk with the vessel at Sibu Wharf. The plaintiff also relied on the doctrine of *res ipsa loquitor*. The learned Magistrate dismissed the plaintiff's claims and the plaintiff appeal against the whole of the decision.

The defendant pleaded frustration of the contract due to inevitable accident. Defendant claimed that all reasonable care and skill had been exercised in trying to avoid the incident which an occurrence beyond their control. Defendant also contended that plaintiff had voluntarily accepted the risk as plaintiff had neglected to obtain insurance cover to the motor car despite their advice to do so. Defendant also relied on a Freight Advice Bill and an exclusion clause therein exempting claims for loss or

damage but plaintiff's witness denied ever having seen or been handed the said Bill.

Held:

[1] Defendant alleges the contract has been frustrated. The burden is on defendant therefore to establish that the contract had been frustrated due to the sinking of the vessel as a result of an inevitable accident. The evidence shows that the defendant's agents, the captain and crew, had not taken prudent steps to avoid the vessel from sinking. When the vessel was discovered to be tilting, the water in the bilge was pumped out but no action was taken to go to the nearest port to have the vessel berthed and the condition of the vessel checked. The vessel in fact travelled for $13^{1}/_{2}$ hours to arrive at Sibu Wharf instead of berthing at the nearest jetty along the Sarawak River. The sinking of the vessel therefore cannot be said to be an inevitable accident and the learned Magistrate had erred in her finding which went against the weight of the evidence adduced. The defence of frustration fails in aiding the defendant.

[2] When the goods of a party is put under the charge of a carrier and subsequently the goods are lost when under the carriers charge, a presumption arises that the event and the loss is caused by negligence on the part of a carrier. The defendant must rebut the presumption and this is the doctrine of *res ipsa loquitor*. There is an inference that the incident would not have happened without the negligence of the defendant. The evidence shows that defendant has failed to rebut the presumption. The learned Magistrate erred for requiring the plaintiff to establish the facts which were within the knowledge of the defendant and well known by him.

[3] The existence of the Freight Advice Bill and the exemption clause contained therein is disputed by the plaintiff's witness who handed the car to the defendant's employee. It is for the defendant to satisfy the court that the Bill was in fact given to the plaintiff. There is a lack of witness testimony from the defendant on this issue. In any event, the Advice Bill exhibited shows that the exclusion clause is not worded in clear terms and the defendant cannot hide behind the clause in the Bill.

[4] An appellate Court is entitled to reverse a finding of the lower court if it is convinced that the finding of facts is wrong or against the weight of the evidence adduced bearing in mind that the lower court has had the advantage of assessing the witnesses' demeanour and the value of their testimony at first instance. In all the circumstances of the present case, the learned Magistrate was wrong in arriving at the conclusion's she did by not having taken proper advantage of her having seen and heard the witnesses. The decision of the lower court is therefore reversed.

[Appeal allowed; costs of appeal and of the lower court to be borne by defendant/respondent].

Cases referred to:

Siti Aisha binti Ibrahim v. Goh Cheng Hwai [1982] CLJ 544/[1982] 2 MLJ 124 ***(refd)***

Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn. Bhd. [1993] 2 CLJ 146/[1993] 1 MLJ 113 SC ***(refd)***

Davis Contractor Ltd v. Fareham UDC [1956] 2 All ER 145 ***(refd)***

Zainun bte Abdul Ghani & Anor. v. Chong Ah Seng & Anor. [1975] 1 MLJ 33 ***(refd)***

Barkway v. South Wales Transport Co. Ltd. [1948] 2 All ER 460 ***(refd)***

For the plaintiff - Peter Yip; M/s. Yip & Co.
For the defendant - John Shek; M/s. John Shek & Co.

JUDGMENT

Haji Abdul Kadir bin Sulaiman J:

This is an appeal against the whole of the decision of the learned Magistrate given on 19 February 1992 dismissing the claim of the appellant for damages for breach of contract and negligence. Altogether eight grounds were put up by the appellant. During the hearing the fifth ground was abandoned leaving only seven grounds. From the seven grounds, five were on the issue that the decision of the learned Magistrate is against the weight of the evidence, one on the failure to invoke the doctrine of *res ipsa loquitor* and the other on the holding that the contract between the appellant and the respondent has been frustrated due to an inevitable accident.

In her grounds of judgment the learned Magistrate gave the following reasons for dismissing the claim of the plaintiff:

(a) the defendant had exercised due care and due diligence and therefore, there was no negligence on the part of the defendant;

(b) the contract between the plaintiff and the defendant has been frustrated as it became incapable of being performed that arise without the fault of the defendant. It is an inevitable accident as the defendant has

proved something happened over which he had no control and it could not have been avoided by the exercise of care in the circumstances.

The decision of the learned Magistrate was essentially on the finding of facts based on the evidence presented to her at the hearing. It is settled law that on the issue of facts an appellate Court is slow in disturbing the finding. This is so because the advantages available to the lower Courts in assessing the value of the testimony of witnesses, their demeanour and the impression made by them upon the trial Magistrates are denied to the appellate court. However the appellate court is entitled to reverse such finding if it is convinced that the finding of such facts by the lower court is wrong or against the weight of the evidence adduced. Abdul Hamid FJ (as he then was) in *Siti Aisha binti Ibrahim v. Goh Cheng Hwai* [1982] 2 MLJ 124 FC said at p. 126:

> ... an appellate court may be justified in coming to a different conclusion if there is valid reason to think that the trial Judge had not taken proper advantage of his having seen and heard the witnesses.

In *Tan Sri Khoo Teck Puat v. Plenitude Holdings Sdn. Bhd.* [1993] 1 MLJ 113 SC at p. 117 Gunn Chit Tuan CJ (Malaya) has this to say:

> As regards the principles on which an appellate court may interfere with a lower court's findings of fact we would refer to the following passage in the judgment of Lord Guest in *Tay Kheng Hong v. Heap Moh Steamship Co. Ltd.* in which his Lordship stated as follows:
>
> There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt* or *Thomas v. Thomas* [1947] 1 All ER 582 at p. 587:
>
> 1. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion.
> 2. The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
> 3. The appellate Court, either because the reasons given by the trial Judge are not satisfactory or because it mistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.
>
> Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v. Edinburgh & District Tramways Co Ltd* [1919] SC (HL) 35 at p. 37:
>
> In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privileges of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

Applying the above principles to the present appeal, will the plaintiff succeed in urging upon me to upset the finding of the learned Magistrate in the Court below who enjoyed the advantage of having seen and heard the witnesses, with that of my own based on the printed evidence?

The background facts leading to this action by the plaintiff are these. The defendant is a common carrier. On 29 September 1988 the plaintiff through his servant handed over a Toyota motor car to the servant of the defendant for shipment to the consignee, Lian Soon Motor in Limbang, Sarawak. The defendant's vessel M.V. Tung Hin carrying the plaintiff's motor car among its cargo left Kuching enroute to Limbang on 30 September 1988. When the vessel reached Tg. Sirik the master of the vessel noticed that the vessel was tilting 10 degrees to port. Faced with the danger that the vessel might capsize, the master diverted the vessel to Sibu, Sarawak instead of proceeding to Limbang. The vessel arrived at Sibu Wharf also known as Burung Apu Wharf or Pulau Babi Wharf on 2 October 1988 at about 3. 30 a.m. At about 5.30 a.m. that

morning the vessel sank together with the plaintiff's motor car and was never recovered. By a summons dated 21 March 1989 and the statement of claim subsequently amended on 5 April 1990, the plaintiff claims against the defendant for breach of duty under the contract and alternatively for negligence in the carriage, care and charge of the motor car by reason whereof the same was sunk with the vessel at Sibu Wharf. The plaintiff, *inter alia*, relies upon the doctrine of *res ipsa loquitor*. The claim of the plaintiff is for a sum of RM19,500 being the cost of motor car, interest at 8% p.a., court fee of RM50 and advocate fee of RM500.

In the amended defence, the respondent admitted that he was a common carrier for reward, and he had a contract with plaintiff to deliver the motor car to the consignee in Limbang. However, the performance of the said contract became (without any fault on his part) impossible to perform. Hence the contract was frustrated. The reason for the frustration of the contract is given in the particulars of the defence that since the vessel sunk at Sibu Wharf it became impossible for the defendant to ship the said motor car to the consignee in Limbang in order to perform the contract with the plaintiff. The sinking arose from inevitable accident and notwithstanding the exercise of all reasonable care and skill on his part he was unable to avoid the same.

On the issue of negligence, he puts the plaintiff to strict proof of it. In the alternative the defence of the defendant is that the plaintiff voluntarily consented to accept the risk and to waive any claim in respect of the loss suffered by the plaintiff as he had requested the plaintiff to obtain an insurance cover for the motor car but the plaintiff refused. He relied on the Freight Advice Bill which indicates that the defendant would not be liable for any loss or damage in the event of any accident.

In the reply by the plaintiff, he denies frustration of the contract when the vessel sank at Sibu Wharf. He also denies knowledge of the Freight Advice Bill and consent to accept the risk and to waiver and in the alternative, the defendant is not excluded from liabilities for such loss.

Thus the issue before the Court is whether:

(a) the contract has been frustrated;
(b) the defendant is negligent;
(c) the doctrine of *res ipsa loquitor* applies; and
(d) the defendant is protected by the exemption clause.

I will now deal first with the issue of frustration. Frustration of contract occurs whenever the law recognises without fault of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract: *Davis Contractor Ltd v. Fareham UDC* [1956] 2 All ER 145. In the instant case, the defendant alleges that the contract has been frustrated. His contention is that the sinking of the vessel with the motor car of the plaintiff was due to inevitable accident . Therefore, the burden is on him to establish that it was so. In *Zainun bte Abdul Ghani & Anor. v. Chong Ah Seng & Anor.* [1975] 1 MLJ 33 it is stated that there is no inevitable accident unless the defendant can prove that something happened over which he had no control and the effect of which could not have been avoided by the exercise of care and skill. In other words the accident must have happened without the negligence of the part of the defendant . According to the evidence of DW3, Ling Tai Kwong the captain of the vessel, he did not know the reason for the sinking of the vessel at 5.30 a.m. on 2 October 1988. After the vessel sank he wrote a letter to Marine Officer, Sibu. This letter is exhibit P2 (a) dated 3 October 1988, one day after the sinking of the vessel. According to the letter, on 1 October 1988 at 12.00 noon the vessel passed through Tg. Sirik and the sea was very rough. He realised that the vessel was not balanced, that is, it is tilting. For that reason he returned to the nearest port that is, Sibu. At that moment he asked the engineer to pump out the water from the vessel. This goes to show that at that time there was water in the vessel. After an hour he was told there was no more water in it. The vessel reached Sibu Wharf around 3.30 a.m. So, the journey from Tg. Sirik to Sibu Wharf took about 13 $^{1}/_{2}$ hours. There is no evidence that anything else than the pumping out of water was done to the tilting vessel. At Sibu Wharf, the engineer was again told to pump out the water which he did for an hour after which he was told there was no more water and they went to sleep. Nothing was done to check as to why the boat tilted. At about 5.30 a.m. the same day a crew on duty told him the ship had tilted to one side and so he asked all the crews to abandon the vessel. At about 6.30 a.m. he went to the police station to report the

incident. When he came back he could not find the engineer. In his further testimony in Court DW3 testified that the Marine Officer also recorded a statement from him. The statement was tendered by the plaintiff and marked as exhibit P2(b). In the statement he stated that at about 12.30 p.m. on 1 October 1988 while at Tg. Sirik he noticed that the vessel was not balanced and listed to port approximately 10 degrees. He found water in the bilge and took one hour to pump out the water. It was at this point when the vessel was tilting that he decided to divert to Sibu. The question to ask here is why must the vessel tilt and why was there water in the bilge? The vessel was then no longer in stable condition with the likelihood of water accumulating in the bilge that would cause the boat to sink. Though the weather was fine, the wave was 6 to 7 feet high. What was the prudent step to take in the circumstances? The vessel should have been steered to the nearest coast or jetty. But instead the vessel spent 13 $^{1}/_{2}$ hours travelling to the inland port of Sibu with the crew doing nothing but hoping to reach the destination. To reach Sibu the vessel has to travel along the Sarawak River wherein all the way it is served by jetties and the two river banks. But no action was taken to have the vessel berthed and check the condition of the vessel. When the vessel went alongside Sibu Wharf on 2 October 1988 at 3.30 a.m. it was dark and raining heavily and the loadline mark could not be seen. When they reached the wharf, all but one crew went to sleep. According to the learned Counsel for the defendant, being in such an hour the crew could do nothing as there was no crane of sort to help do the work. The question is why the crew had to wait that long before something is done to save the vessel from sinking? Leaving the vessel in that condition, at about 5.25 a.m. on that fateful morning it was discovered that the boat listed to port approximately 25 to 30 degrees wherein all the crew were ordered to abandon the vessel. The witness suspected that the uneven placement of the cargo on the vessel could have caused the boat to tilt but alas he decided to check only during daylight of 2 October 1988. Why wasn't this done during the daylight of 1 October 1988 when listing was first discovered? On these hard facts the learned Magistrate in her judgment held that the accident was inevitable as the sinking was without the fault of the defendant. I am convinced that the finding of such facts by the lower court is wrong or against the weight of the evidence adduced. In the circumstances I am of the opinion that the defendant has failed to establish that the loss to plaintiff's goods was on account of inevitable accident. In the circumstances the defence of frustration of the contract must fail. I differ from the findings of the learned Magistrate because she has not taken proper advantage of her having seen and heard the witnesses.

Next I will deal with the issues of negligence and the doctrine of *res ipsa loquitor* together. On the issue of negligence, when the goods of the plaintiff is in the charge of the defendant as a common carrier under the contract of carriage with the plaintiff is lost there is a presumption that the event is caused by the negligence on the part of the defendant and the plaintiff will succeed unless the defendant can rebut this presumption. This is what is called *res ipsa loquitor*. The general rule is a party which asserts must establish the assertion and not for the opposite party to prove the negative. The burden is said to be on the party asserting. This is equally true in negligence cases. However, with the application of the doctrine of *res ipsa loquitor* this evidential burden is shifted for it is within the knowledge of the opposite party of the circumstances which lead to the inference that such circumstance would not have happened without the negligence of the opposite party. In such a situation, the burden of satisfying the Court on the balance of probability that the opposing party is not negligent is on him. In this case, by a contract entered into between the plaintiff and the defendant, the plaintiff's motor car was handed to the charge of the defendant, a common carrier, for delivery in the course of business to the consignee in Limbang. The said motor car never reached the destination. The plaintiff alleges negligence against the defendant. So, if the defendant disputes the allegation, it is for him to satisfy the Court so on the balance of probability. It is no rebuttal for the defendant to say that the goods were lost because the vessel which carried it sank since the sinking of the vessel *per se* is a neutral event consistent with negligence and equally consistent with due diligence on the part of the defendant. So, in order to rebut the presumption the defendant must go further and prove (or it must emerge from the evidence as a whole) either:

(a) that the sinking of the vessel itself was due to specific cause which does not

connote negligence on his part but points to its absence as more probable; or

(b) if he can point to no such specific cause that he used all reasonable care in and about the management of the vessel. See *Barkway v. South Wales Transport Co. Ltd.* [1948] 2 All ER 460.

In this case, going through the evidence I am of the view that the defendant has failed to rebut the presumption. The learned Magistrate in her judgment stated that negligence in failing to take any or any adequate step or precaution to prevent the plaintiff's car from sinking with the vessel cannot be established by the plaintiff. On the circumstances of this case, she has erred for requiring the plaintiff to establish the facts well known to the defendant. She went on to say that in her opinion the defendant had exercised due care and due diligence and the allegation of negligence from the plaintiff would not stand. She based her finding partly on the evidence of PW2, Capt. Goh Chin Guan, Senior Marine Officer, Sarawak who in his evidence stated that no action by the Department was taken against the owner of the vessel for any negligence or foul play. If there is any negligence or foul play he would instantly take action. For whatever it is worth in that part of the evidence of PW2, he also stated in his evidence that proper investigation was not conducted and no preliminary inquiries were conducted in this case. He was given no instruction to investigate the matter. For that reason he said he was not sure whether there was any negligent act or foul play. So how could the learned Magistrate conclude that no negligence by the defendant has been established? In any event the establishment of negligent conduct of any party is to be determined by Court of law by established principles. It is not for someone to give a bare statement of fact that someone else is negligent without more. The learned Magistrate also based her conclusion on the evidence of PW2, a retired Marine Officer, Sibu whom she said cannot establish any negligence on the part of the defendant or his servant or agents. By this the learned Magistrate wants the plaintiff to establish that facts of negligence which according to the circumstances of this case, the burden of establishing that he is not negligent is on the defendant. I am of the view that the learned Magistrate is wrong on her findings of facts to disentitle the appellate court from disturbing her findings. I therefore, hold that for failing to rebut the presumption the plaintiff succeeds in his claim against the defendant.

Lastly I will deal with the issue of exemption clause contained in the Freight Advice Bill No. 08753 dated 29 September 1988 exhibited as D1(a). The clause states:

> All goods shipped on our vessels must be accompanied by cover note or insurance policy. No liability is accepted for loss, damage, breakage, or leakage by any cause whatsoever.
>
> In the event of any shortage or missing goods involved at the time of taking delivery, please obtain official documents from vessel's representative or give notice to our Head Office Within 21 Days of delivery, to enable the investigation to be conducted. Notice given after the said period will be ignored and no claim will be entertained.

There is a serious dispute in relation to the existence of this exhibit D1(a). In her judgment the learned Magistrate did not touch at all on this issue of exemption clause relied on by the defendant. I think the reason is because she had made the finding that the contract has been frustrated and that the defendant was not negligent, and therefore no longer necessary for her to dwell on the issue of exemption clause. In the court below, the learned counsel for the plaintiff submitted at length on the issue. However, at the hearing of this appeal, the learned Counsel did not submit anything on the issue because the appellant's appeal does not include an appeal on the matter. The learned counsel for the plaintiff in the court below challenges the existence of this exhibit which purportedly contained the exemption clause. According to the evidence of PW1, a partner of the plaintiff firm, on 29 September 1988 he delivered the car to a person in charge of loading into the vessel of the defendant whose name he did not enquire. When exhibit D1(a) was shown to him, he said that he was not given the exhibit by the defendant or anyone else. No one advised him to take insurance for the car and no one told him that he was sending the car to the consignee at his own risk. No one told him that if he did not take the insurance, any damage caused to the car will not be paid by the owner of the vessel. If the facts were known to him he would not agree to transport the vehicle through the defendant but would use other vessels instead for he was not in a hurry to have the vehicle transported and delivered to the consignee. Prior to this

date he had never shipped any goods through the defendant. In his experience when transporting goods with other vessels he was never given any freight advice bill. In answer to cross-examination, he said that he seldom shipped any vehicle outstation for most of the vehicles were sold locally. For transporting outstation he never bought any insurance. On this occasion that he handed over the motor car to the defendant, he did not ask for the cost of transporting to Limbang as the cost would be paid by the consignee. In re-examination he said that there is no necessity for the defendant to issue the freight advice bill to him as the plaintiff is not paying for the cost of transport. For the defendant, DW2, Lau Meng Chua gave the following evidence. On the day in question he received the plaintiff's motor car on behalf of the defendant from a person whose name he did not know but in Court he identified PW1 as the person. He was the only person in charge of the receipt of the goods to be transported by the defendant at the material time. He said that he told the witness to buy insurance but was told that it was not necessary. He then asked PW1 to follow a clerk Ling Leong Kong to the defendant's office to collect a receipt. It is to be noted that this clerk was not called as a witness in this case. On the question of payment of the costs of the transport he admitted that in respect of goods to be sent outstation, payment would not be made in Kuching but be paid by the consignee outstation.

The exemption clause if at all an exception clause is contained in the disputed exhibit D1(a) tendered by the defendant. So it is for the defendant to satisfy the Court that it was in fact given to the plaintiff. There was a mention of a receipt issued by the clerk Ling Leong Kong. Since this clerk has not come forward to testify, we do not know what is that receipt all about or whether it is the freight advice bill. In any event why should the bill be given to the plaintiff when payment for the transport cost was to be borne by the consignee in Limbang? I would, therefore, agree with the submission of the learned counsel for the plaintiff in the Court below that the plaintiff should not be liable for exemption, if any. Talking about the requirement of an insurance for the car, which is disputed by the plaintiff, it is so general in nature. Of course every car to be used in public requires an insurance in respect of third party risks. If the defendant meant the requirement for insurance for other purpose such as to indemnify the defendant against risks in the transport of the vehicle it should be expressed in a clearer form. In the circumstances I am of the view that the defendant in this particular case cannot hide himself behind the printed exemption clause contained in a freight advice bill issued. The learned Counsel on the other hand in his submission in the Court below says that the provisions of the exemption clause was brought to the notice of the plaintiff by relying on exhibits D2 and D3. To me they are irrelevant as they relate to other persons and other vehicles. The mere fact that those persons insured their vehicles does not necessarily mean that the plaintiff was aware of the exemption clause. Each case depends on the facts and circumstances of the case and in this case I am satisfied that the provisions of the exemption clause were never brought to the attention of the plaintiff and the plaintiff was not aware of the existence of the clause.

So, in all the circumstances, I hold that the learned Magistrate was wrong in arriving at the conclusion as she did by not having taken proper advantage of her having seen and heard the witnesses. I therefore, allow the appeal by the plaintiff. The decision of the learned Magistrate is reversed. Judgment for the plaintiff/appellant. Respondent is ordered to pay the claim of the plaintiff/appellant and costs of this appeal and the lower court to be paid by the defendant/respondent to the plaintiff/appellant. Appeal allowed.